

Service Date: October 17, 1997

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER OF THE COMPLAINT BY)	UTILITY DIVISION
Colstrip Energy Limited Partnership against the)	DOCKET NO. D97.7.127
Montana Power Company.)	ORDER NO. 6017

IN THE MATTER OF THE COMPLAINT BY)	UTILITY DIVISION
Yellowstone Energy Limited Partnership against)	DOCKET NO. D97.7.129
the Montana Power Company.)	ORDER NO. 6018

IN THE MATTER OF THE COMPLAINT BY)	UTILITY DIVISION
The Montana Department of Natural Resources)	
and Conservation against the Montana Power)	DOCKET NO. D97.8.143
Company.)	ORDER NO. 6019

FINAL ORDER

Introduction

1. On June 30, 1997 the Montana Public Service Commission (Commission) received copies of letters from the Montana Power Company (MPC) to its qualifying facilities (QFs)¹ notifying the QFs that pursuant to contract, "beginning as early as July 3, 1997, MPC may interrupt or reduce deliveries of Capacity and Energy from your Project."² The copies were sent to the Commission by Perry Cole, MPC Vice President of Business Development and Regulatory Affairs. In his cover letter Mr. Cole wrote, "Pursuant to Section 38.5.1903(1)(iii) of the Administrative Rules of Montana, MPC must notify the Commission at the same time that the QFs are served notice of the actions that are outlined in the letters."

2. In response to MPC's notice of "curtailment" of energy and capacity from its QFs, and to its actual curtailment, three QFs filed formal complaints with the Commission. Colstrip Energy Limited Partnership (CELP) filed a complaint on July 18, 1997; Yellowstone Energy Limited Partnership (YELP) filed a complaint on July 22, 1997; and the Department of Natural Resources and Conservation (DNRC) filed a complaint on August 7, 1997. Each complaint

¹ This refers to the QFs that are connected to MPC and from whom MPC must purchase power pursuant to federal and state law.

² The letters are dated June 27, 1997 and are signed by Robert Stuart, Manager, Energy Contracts. MPC has a separate power purchase contract with each QF.

asserts Commission jurisdiction, pursuant to federal and state law, to determine whether MPC has met the necessary curtailment preconditions as set forth in contract and at ARM 38.5.1903(1)(iii).

3. On August 1, 1997 the Commission issued a Notice of Complaint, Notice of Commission Inquiries and Notice of Commission Action regarding the CELP and YELP complaints. On August 21, 1997 the Commission issued a Notice of the DNRC complaint. On August 13, 1997 MPC filed answers to the CELP and YELP complaints, raising as an affirmative defense in both cases that "the Commission may lack subject matter jurisdiction over the Petition." On August 21, 1997 the Commission consolidated the three complaint dockets and established a briefing schedule on the jurisdictional question raised by MPC. Notice of Commission Action, Notice of Consolidation of Dockets and Notice of Staff Action Establishing Briefing Schedule. MPC filed a brief on jurisdiction and answer to the DNRC complaint on September 5, 1997. CELP, YELP and DNRC filed response briefs by September 19, 1997 and, although not contemplated by the briefing schedule, MPC filed a reply brief on October 1, 1997. This order is limited to the question of whether the Commission has jurisdiction to grant the relief requested in the complaints by CELP, YELP and DNRC.

Discussion

4. The Commission does not agree with all of MPC's legal analysis.³ It is not necessary, however, to address most of it because the Commission finds that MPC makes several points that are dispositive of the jurisdictional question.

³ For example, Judge Honzel, in Colstrip Energy limited Partnership v. The Montana Power Company, the Montana Public Service Commission and MDU Resources Group, Inc., Cause No. CDV-94-582, Montana First Judicial District Court, did not find the Commission without constitutional authority (separation of powers) to determine or interpret contracts. Rather, Judge Honzel wrote specifically on this point that, "Because the Court has already determined that Section 69-3-603, MCA, does not confer jurisdiction over executed contracts on the PSC, it is not necessary to address ... [constitutional] arguments." Memorandum and Order Regarding Jurisdiction, *supra*, p. 7. This makes irrelevant the language that MPC quotes from page 4 of that Memorandum and Order. DNRC has correctly analyzed the question of separation of powers and agency action, an analysis that closely mirrors arguments the Commission has made in state district court and the Montana Supreme Court. See Response of Defendant Montana Public Service Commission to Plaintiff's Motion for Summary Judgment and Reply Brief of Defendant Montana Public Service Commission to Plaintiff's Motion for Summary Judgment, Montana First Judicial District, Cause No. CDV-94-582, *supra*; also, Brief of Defendant-Appellant Montana Public Service

DOCKET D97.7.127, ORDER NO. 6017; D97.7.129, ORDER NO. 6018 and D97.8.143,
ORDER NO. 6019

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5. First, MPC is correct that it has been decided in state district court that the Commission does not have the statutory authority to determine executed contracts between utilities and QFs. *See* citation at fn. 3, *supra*. Therefore, to the extent MPC's curtailments raise only questions of contract interpretation between MPC and QFs, those questions are not properly before the Commission.

6. Second, complainants argue that the issue is not contract interpretation, but whether MPC has met the requirements of ARM 38.5.1903(1)(iii). Even MPC, as evidenced by the reference in Perry Cole's June 27, 1997 cover letter, seemed to believe at one time that its curtailment notice and action implicated ARM 38.5.1903(1)(iii). If the jurisdictional issue were one of compliance with Commission rule, then there would be little doubt that the Commission has jurisdiction over these complaints.⁴ In its latest brief, however, MPC contends that if ARM 38.5.1903(1) is construed correctly, ARM 38.5.1903(1)(iii) does not apply to the disputes between MPC and the complainants. The Commission agrees.

⁴ This assumes the validity of the Commission rule, something MPC appears to question. The Commission assumes that ARM 38.5.1903(1)(iii) is valid and bestows legitimate authority on the Commission. It is not necessary to resolve this issue in order to decide the jurisdictional question.

7. ARM 38.5.1903(1) requires utilities to purchase energy and capacity from QFs, with three exceptions. First, a utility does not need to purchase if there is a system emergency and the purchase would "contribute to the emergency." This exception is not at issue here. Second, a utility does not have to purchase for reasons agreed to in contract between the utility and a QF. The QFs agreed to a term in their contracts with MPC allowing MPC to curtail under certain operational circumstances and after certain notice. Third, a utility does not have to purchase given certain operational circumstances described at ARM 38.5.1903(1)(iii)⁵. A utility invoking this rule must give one month notice to the affected QF and the Commission.

8. The QFs chose, pursuant to ARM 38.5.1903(1)(ii), to stipulate in contracts with MPC the terms of "light loading" curtailment. By so stipulating they chose not to force MPC to

⁵ (iii) if, due to operational circumstances, purchases from a qualifying facility will result in costs greater than those which the utility would incur if it did not make such purchases. This provision is only applicable in the case of light loading periods in which the utility must cut back base load generation in order to purchase the qualifying facility's production followed by an immediate need to utilize less efficient generating capacity to meet a sudden high peak. Any utility seeking to invoke this exception must notify each affected qualifying facility and the commission one month prior to the time it intends to invoke this provision. Failure to properly notify the qualifying facilities and the commission or incorrect identification of such a period will result in reimbursement to the qualifying facility by the utility in an amount equal to that amount due had the qualifying facility's production been purchased.

comply with the requirements of ARM 38.5.1903(1)(iii), including the notice requirement and verification by the Commission. The QFs were not required to stipulate with MPC over "light loading" curtailment. The contracts could have been silent on the question or they could have referred to Commission rule. In both cases Commission rule would control and the Commission would properly determine compliance. By stipulating the question in contract, however, the QFs effectively placed jurisdiction over a dispute on the question in district court, and removed it from the Commission. By stipulating the question in contract the QFs made ARM 38.5.1903(1)(iii) inapplicable to these disputes.

9. CELP and YELP argue that, "a party cannot evade agency regulation or assign a dispute to a court merely by virtue of adopting a contract that addresses the same subject matter." Briefs of CELP and YELP, p. 2. This is true in most circumstances; but where, as here, there is an agency rule that sanctions the option of parties arranging their affairs by contract rather than relying on agency regulation, it is not true.⁶ Furthermore, it was not MPC that "assign[ed] a dispute to a court." It takes two to contract and it was the QFs as much as MPC that took this dispute out of Commission jurisdiction.

10. CELP and YELP also argue that, "there is nothing in these statutes or regulations that precludes the Commission from asserting jurisdiction on matters that may also be the subject of contracts." Briefs of CELP and YELP, p. 9 (emphasis in original). This statement is not correct given the federal and state legal framework that defines the rights and responsibilities of

⁶ Federal law also sanctions contracts between utilities and QFs that contain terms and conditions different from the terms and conditions specified in rule. 18 CFR . 292.301, adopted by reference by the Commission at ARM 38.5.1901(1), reads in pertinent part:

(a) *Applicability.* This subpart applies to the regulation of sales and purchases between qualifying facilities and electric utilities.

(b) *Negotiated rates or terms.* Nothing in this subpart:

(1) Limits the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required by this subpart[.]

Federal and state law create terms and conditions and rules that utilities and QFs may rely on. But utilities and QFs can alter these terms and conditions by contract if they choose.

utilities vis-a-vis QFs.⁷ As noted, that framework contemplates and sanctions utility/QF contracts that may contain terms and conditions different than the terms and conditions contained in regulation and rule. It is conceivable that a utility and QF could enter into a contract so contrary to the public interest that the Commission would find it necessary to assert its authority in some manner. But that is not the case here.

11. Finally, the Commission agrees with most of the arguments of the complainants in support of Commission jurisdiction over questions of compliance with Commission rules. The issue, however, is not MPC's compliance with Commission rule, but MPC's compliance with its QF contracts. The legislature has determined that resolution of that issue belongs in court.

CONCLUSIONS OF LAW

1. The Commission generally does not have jurisdiction to decide disputes between utilities and QFs over the terms and conditions of executed contracts. ' 69-3-603, MCA.

2. Utilities and QFs generally may agree to terms and conditions related to the purchase of power that differ from terms and conditions otherwise required by rule. 18 CFR ' 292.301(a)(b)(1) and ARM 38.5.1903(1)(ii).

ORDER

For the reasons stated above the Commission declares it does not have jurisdiction to resolve these complaints.

DONE AND DATED this 15th day of October, 1997 by a vote of 5-0.

⁷ Of course, in a very narrow sense, presumably unintended, it is true that nothing "precludes the Commission from asserting jurisdiction." The question is whether the Commission has jurisdiction, or perhaps ought to assert it, not whether it can assert it.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DAVE FISHER, Chairman

NANCY MCCAFFREE, Vice Chair

BOB ANDERSON, Commissioner

DANNY OBERG, Commissioner

BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days of the service date of this order. See ARM 38.2.4806.